Supreme Court, U.S.
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NO. 90-1086

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1991

STATE OF ALABAMA,

Petitioner,

v.

BRAD HAYWOOD SIMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA
AND ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF
IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state appellate court's finding and conclusion that evidence recovered from Respondent's home should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing intentional or reckless misrepresentations which, when deleted, left no basis for a finding of probable cause, should be respected?

2. Whether the state appellate court's finding and conclusion that Respondent was deprived of his right to equal protection of the law due to the prosecution's discriminatory exercise of peremptory challenges of potential jurors should be respected?

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OPINIONS BELOW

The statement of opinions below contained in the certiorari petition is correct.

JURISDICTION

The statement of jurisdiction contained in the certiorari petition is correct.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourth Amendment to the United States Constitution, which provides:

> "The right to the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) Section 1 of the Fourteenth Amendment to the United States

Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Article I, Section of the Alabama Constitution of 1901 which provides: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty and the pursuit of happiness."

(4) Article I, Section 6 of the Alabama Constitution of 1901 which provides: "That in all criminal

prosecutions, the accused has a right ... in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not .. be deprived of life, liberty, or property, except by due process of law...."

(5) Article I, Section 22 of the Alabama Constitution of 1901 which provides: "That no ex post facto law, or any law ... making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment."

(6) Section 12-16-56, Code of Alabama provides: "A citizen shall not

be excluded from jury service in this state on account of race, religion, sex, national origin or economic status."

STATEMENT OF THE CASE

Procedural Background

The October 1989 Grand Jury of Montgomery County, Alabama returned an indictment charging Montgomery police officer, Respondent, Brad Haywood Sims with having sold cocaine. (R. Vol XV, pp. 2039-2040). Sims was tried by a jury in December of 1989. However, the jury was unable to reach a verdict and, on December 18, 1989, a mistrial was declared and the jury was discharged. (R. Vol. III, p. 620). Sims moved the Circuit Court of Montgomery County, Alabama to dismiss the charge against him, or, in the alternative, to enter a judgment of acquittal in his favor and a

plea of former jeopardy and motion to dismiss on the ground that there was insufficient evidence presented during the trial upon which a conviction could be based. (R. Vol. XV, pp. 2097-2100, 2154-2155). The Circuit Court of Montgomery County, Alabama overruled those motions. (R. Vol XV, pp. 2101, 2154). Sims appealed to the Alabama Court of Criminal Appeals from the denial of his motion for a judgment of acquittal. (R. Vol. XV, p. 2161). The Alabama Court of Criminal Appeals dismissed the appeal on January 22, 1990. (R. Vol. XV, p. 2160). Sims was tried again by a jury in January of 1990. The jury returned a verdict of guilty. (R. Vol. XIII, p. 1936). Sims was sentenced to a term of imprisonment of ten years. That sentence was

suspended conditioned upon Sims serving three years in the penitentiary. (R. Vol XV, pp. 2026-2030).

The Alabama Court of Criminal Appeals reversed Sim's conviction. The Alabama Court of Criminal Appeals based its holding upon two independent grounds.

First, the Alabama Court of Criminal Appeals found and concluded that evidence recovered from Sims' home should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing misrepresentations made either intentionally or with reckless disregard for the truth which, when deleted, left no basis for a finding of probable cause. The Alabama Court of Criminal Appeals quoted from Franks v.

Delaware, 438 U.S. 154, at 155-56, 987 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> "'Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

The Alabama Court of Criminal Appeals set forth the following statements appearing in the subject

warrant affidavit:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to be 'crack cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours.
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.
>
> "Further probable cause being that 'A' has given the affiant information in the past which has proven true through investigative means.
>
> "Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.
>
> "Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.
>
> "Further probable cause being that intelligence information

> obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.
>
> "As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed at least with a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics & Intelligence Bureau, Administrative Division, Montgomery Police...."

(Emphasis supplied by Alabama Court of Criminal Appeals.)

The Alabama Court of Criminal Appeals found and concluded that "[i]t is clear from a review of the [suppression hearing that the complained-of statements were made with at least a reckless disregard of the

truth. The informant, upon whom [the affiant, Officer] Lay, based his information, did not enter the home of [Sims] and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson." The Alabama Court of Criminal Appeals found that "[t]he misrepresentations made by Officer Lay resulted in his committing two offenses: '[o]ne against the constitutional guarantee against unreasonable searches, and a second against the judicial system.' United States v.] Cortina, 630

F.2d [1207,] 1213 [(7th Cir. 1980)]." After deleting the misrepresented portions from the affidavit, the Alabama Court of Criminal Appeals found that no probable cause existed and concluded that all the evidence discovered as a result of the search of Sims' house was due to have been suppressed.

Second, the Alabama Court of Criminal Appeals found and concluded that Sims was deprived of his right to equal protection of the law due to the prosecution's discriminatory exercise of peremptory challenges of potential jurors. The Alabama Court of Criminal Appeals found from the record "that 16 members of the 48 member venire were black and that of the state's 18 strikes, 14 were used to strike black vernirepersons." Noting that after Sims

objected to the prosecution's use of peremptory challenges, "the trial court then required the state to explain its use of peremptory strikes," the Alabama Court of Criminal Appeals proceeded to review the explanations proffered by the prosecution.[1] The Alabama Court of Criminal Appeals found a number of the strikes to be nondiscriminatory. However, the Alabama Court of Criminal Appeals, stated that "[t]he reasons

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[1] In Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395, 111 S.Ct. 1859 (1991), this Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a preliminary prima facie showing becomes moot." The Alabama Court of Criminal Appeals had previously held the same. Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Currin v. State, 535 So.2d 221 (Ala. Cr. App.), cert. denied, 535 So.2d 225 (Ala. 1988).

offered by the prosecutor for her remaining strikes present[ed] serious doubts ... as to their validity." "In viewing the prosecutor's actions as a whole, ... [the Alabama Court of Criminal Appeals found] that [those] challenges of black veniremembers were not based on sound race-neutral grounds."

To begin with, the Alabama Court of Criminal Appeals opined that the reasons proffered by the State of Alabama for those strikes were not <u>in and of themselves</u> race-neutral. The Alabama Court of Criminal Appeals further noted with respect to two of the proffered reasons that the prosecutor did not seek to dispel any doubts about the jurors with a few more questions on voir dire.

In viewing the prosecutor's actions

as a whole, the Alabama Court of Criminal Appeals considered the bad track record of the prosecution in the case.

> "The record also contains testimony at the Batson hearing from several local attorneys. These attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers. See Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd on other grounds, 548 So.2d 606 (Ala. 1989); Williams [v. State, 548 So.2d 501 (Ala. Cr. App. 1988]; Warner [v. State, [Ms. 3 Div. 945, February 23, 1990] ____ So.2d ____ (Ala. Cr. App. 1990)]. We cite Judge Bowen in Warner, stating:
>
> > "In considering this issue, we have taken note of the fact that the State in this case does not write on a clean slate. A number of cases prosecuted in

> Montgomery County have been reversed because of a Batson violation. Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), affirmed on other grounds, 548 So.2d 606 (Ala. 1989); Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Ackers v. State, 548 So.2d 459 (Ala. Cr. App. 1987). This consideration is a relevant factor in our review. United States v. Hughes, 864 F.2d 78, 80 (8th Cir. 1988). In view of this fact and that fact that the chief deputy district attorney testified that she "highly expected" that she would have to justify her challenges against blacks with racially neutral reasons, we are somewhat puzzled by some of the very weak justifications given by the State."

"Warner, ____ So.2d at ____. The same prosecutor involved

> in the present case, was also involved in Powell, Williams, Warner, and Parker. Of these cases, three were reversed for Batson violations."

The Alabama Court of Criminal Appeals also noted that many of the traits exhibited by black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the State of Alabama.

The Alabama Court of Criminal Appeals, stating twice that it may reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination only if that determination is "clearly erroneous," concluded that the trial court had erred to reversal in denying Respondent Sims' Batson challenge.

The State of Alabama timely filed an application for rehearing with the Alabama Court of Criminal Appeals. That application was overruled on July 26, 1991.

The State of Alabama timely filed a petition for writ of certiorari with the Supreme Court of Alabama. The Supreme Court of Alabama denied the State of Alabama's petition on October 4, 1991.

Factual Background

The Franks v. Delaware Matter

The summary of the trial court evidence contained in the opinion of the Alabama Court of Criminal Appeals is substantially correct.[2]

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[2] The State of Alabama stated in its petition that "[t]he evidence upon which Respondent was convicted is not relevant to the issues ... presented" and submitted its version of the evidence at Respondent's second trial in Appendix "E" to its certiorari petition.

Prior to the each trial, Respondent Sims filed motions to suppress evidence seized from his home pursuant to a search warrant issued by a municipal judge. (R. Vol. XV, pp. 2055-2070, 2105-2120). As grounds for the motions, Sims asserted that the affiant who executed the affidavit had "knowingly, intentionally, or with reckless disregard of the truth, included in his affidavit...false material, in the absence of which the content of the affidavit would have been insufficient to establish probable cause for the issuance of the ... search warrant." (R. Vol XV, pp. 2042-2043, 2059-2060, 2105). Sims alleged that the following

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A more complete and accurate rendition of the evidence at Respondent Sims' second trial is included in Appendix A to this opposition.

statements in the affidavit were false: (1) "That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours" and (2) "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September." (R. Vol. XV, pp. 2060, 2106).

The evidence at a pre-trial suppression hearing held prior to the first trial was as follows:

Robert A. Lay, a detective with the Montgomery Police Department, executed the affidavit upon which the search

warrant was based. (S.R.[3], pp. 7-8). The affidavit contained statements set forth by the Alabama Court of Criminal Appeals in its opinion. (S.R., p. 10, State's Exhibit 1).

Lay identified his informant, referred to as "A" in the affidavit, as Julius Moore. (S.R., p. 12). Lay testified that he based his sworn statement in the affidavit on what Julius Moore had told him. (S.R., p. 12). Lay admitted on cross-examination that Julius Moore had actually stayed in a car and had never gone into Sims' home at the time of the transaction alleged to have taken place between Sims and a third person by the name of Eric Johnson and that Julius Moore had not observed

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[3] The Supplemental Record is designated herein by "S.R."

any drugs inside of Sims' home. (S.R., pp. 12, 13-14, 28). Lay further admitted that Julius Moore had told him that he had stayed in the car at the time Eric Johnson was supposed to have gone to see Sims about drugs and that Julius Moore had not told him that he had seen any drugs stored in Sims' home. (S.R., pp. 12, 15, 16, 17, 22, 23). Lay also admitted that Julius Moore had not told him that he had seen Sims hand Eric Johnson any drugs and that he had not seen Eric Johnson hand any money to Sims. (S.R., pp. 17, 22, 23). Lay said that he was not in the area at the time. (S.R., pp. 12). Lay said that he did not tell Judge Campbell that Julius Moore stayed in the car during the whole transaction and that he did not discuss the case with Judge Campbell. (S.R.,

pp. 17). Lay at one point testified that he did tell Judge Campbell that they had made a controlled buy. (S.R., pp. 17). Lay admitted though that he had earlier testified that he had lost control for at least a half an hour. (S.R., pp. 17). He still claimed though that it was a controlled buy. (S.R., p. 18).[4] Lay said that happened in this instance only up to a point. He said:

> "...we lost him [Julius Moore] before he went into the house, because we were not aware of the residence he was going to. What actually happened was we had no intention of going to 3437 South Perry Street to buy drugs. We were going to

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[4] Lay defined a controlled buy as follows: "A controlled buy is basically where you give an informant money, he goes to a residence, goes in and buys the drugs, search him before he goes in, he buys whatever he buys, comes back out and hands it to you. You search him before he leaves to make sure he didn't take any for his own." (S.R., p. 18).

> Cleveland Court to buy drugs from Miami. Miami was not at home so Julius Moore, some black male who we don't know who he was, was outside going, 'I know where you can get some. Come with me.' So they got in Julius Moore's car... They went down to Duncan Drive; but this time Julius Moore is wired and we're still following him...down to Duncan Drive where they pick up Eric Johnson, who says -- They get out of the car. We can hear them get out of the car and get back in. Eric Johnson gets in the car with the other two saying that he knows where they can get some. And they go down, and shortly after they leave Duncan Drive is where we lost contact with them...We went down and looked for them, couldn't find them. We knew that they had to come back to Duncan Drive to drop off whoever this guy was. So we came back to Duncan Drive and watched them drive back up to Duncan Drive and drop him off."

(S.R., pp. 18-19).

Lay then said: "I don't remember exactly what I told [Judge Campbell]. I don't believe I told him it was a

controlled buy. We went on what was written in the affidavit; and I did not write a controlled buy in the affidavit." (S.R., p. 19). He went on to say

> "I don't remember the exact conversation between myself and Judge Campbell. He read over the warrant, didn't really ask me what happened or what actua'ly went on. He read over the warrant, looked at it. I told him that it was a police officer, because he noticed that down at the bottom, and that was the reason for the no knock clause. What else was said, I'm not really sure."

(S.R., p. 2Ø).

Lay attempted to rationalize his misrepresentations to Judge Campbell in the following manner:[5]

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[5] Of course, Lay did deny having knowingly and intentionally misrepresented anything to Judge Campbell or, with reckless disregard, putting anything in the affidavit which was not true. (S.R., p. 8).

In response to a question from the trial court as to who had seen crack in Sims' home, Lay said:

> "When we put it down and did the search warrant it was on the statement of Julius Moore that Eric Johnson had gone into the residence and met with an unknown subject, he didn't know who it was at that time, brought the crack back out; therefore, in the second paragraph he observed the sale. So, in fact, also the crack had to be in the house; and on the statement he made of Brad Sims coming out to the car and stating that he would have more later, if he wanted to come back to the residence, that, in may opinion as a narcotics investigator, he did, in fact, observe the fact that crack cocaine was being stored in the residence."

(S.R., p. 13). Lay claimed that Julius Moore related to him that he had observed crack being sold out of the residence. (S.R., p. 14). But, when he attempted to explain that claim, he

said: "What he said was that he saw Eric Johnson get out of the car, go around to the back of the house, meet with Brad Sims, they both walked back around, Eric Johnson got back in the car and handed him the dope and he handed Eric Johnson the money, and Eric Johnson went back into the house." (S.R., pp. 14-15). Lay said that Julius Moore had told him that Eric Johnson told him that he was going to get it and that he interpreted that to mean that it was stored in Sims' home." (S.R., pp. 15). He later said:

> "He told me Eric Johnson got out of the car, went to the back of the residence that they were at, which was Brad Sims' house, both subjects came back out, Brad Sims stood in the yard, Eric Johnson same back to the car, gave Julius Moore a bag with crack cocaine inside, Julius Moore gave him $400.00, Eric Johnson walked back up to Brad Sims, who

> turned around when he got to him and walked back around to the back of the house."

(S.R., p. 23). A third time he said:

> "He said Eric Johnson came back to the car and Brad Sims stayed in the yard. Eric Johnson got back in the back seat and handed -- Julius Moore turned around to him and Eric Johnson handed Julius Moore a plastic bag with crack cocaine inside. Julius Moore handed him $400.00. He took the money, got back out of the car, went back up to the house where Brad Sims met him and they walked around to the back of the house." (S.R., p. 24).

Lay also said that Julius Moore told him that Sims told them that if they wanted to come back later he would have some more after 1:00 o'clock. (S.R., p. 25). Lay said that Julius Moore told him that he believed that the cocaine came from Mr. Sims. (S.R., p. 25). Lay said that Eric Johnson had not been searched for drugs himself. (S.R.,

p. 28).

The Circuit Court of Montgomery County denied the motions to suppress.[6] (R. Vol. I, p. 5, R. Vol. XV, p. 2107).

The Batson Matter

In the jury pool from which the parties had to select their jury, there were sixteen blacks and thirty-one whites and one Asian American. The State used 14 of its 18 strikes to eliminate blacks from the jury. Respondent, a black male, made a Batson motion. (R. Vol. IV, p. 147). The trial court then required the State of Alabama to explain its use of peremptory strikes. Chief Deputy District Attorney Ellen Brooks, offered explanations for

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[6] The latest filed motion to suppress was submitted on the same evidence. (R. Vol. 15, p. 2107).

her strikes.[7]

(R. Vol. IV, pp. 160-161).

As found by the Alabama Court of Criminal Appeals, many of the traits exhibited by the black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state.[8]

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[7] A full recitation of Chief Deputy District Attorney Brooks' proffered explanations is set forth in Appendix B.

[8] The following white jurors who were not struck by the State of Alabama had the same information by their names as black jurors who were struck by the State of Alabama: 1) High Crime Area: No. 52 - Elise E. Mitchell (R. Vol. XV, p. 2005); 2) Heard About Alleged Set Up: No. 52 - Elise Mitchell (R. Vol. IV, p.84); No. 54 - Jeff Oswalt (R. Vol IV, pp. 75, 76); 3) Had Opinion Of Innocent: No. 89 - James Deaton (R. Vol. IV, p.6); 4) Unjust Traffic Ticket: No. 54 - Jeff Oswalt (R. Vol. IV, p. 109); 5) Traffic Tickets: No. 54 - Jeff Oswalt (R. Vol. IV, p. 109); 6) 23 Years Of Age: No. 70 - E.D. Moore (R. Vol. XVI, p. 2286); 7) Soft Spoken: No. 88 - Jacqueline Frost (R.

At a follow-up hearing, the several local attorneys testified. As was found by the Alabama Court of Criminal Appeals the "attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers." (R. Vol. XIV, pp. 1953-1954, 1962-1966, 1969-1972, 1974-1978).

Dr. Don Bogie testified that he was the Director of the Center for Demographic and Cultural Research and

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Vol. 4, p. 10); 8) Only Told Occupation, Did Not Tell Where She Was Employed: No. - 35 Linda Brock (R. Vol. IV, p. 122); No. 51 - Myra Meachem (R. Vol. IV, p. 124) 9) Expressed No Knowledge About Case Despite Educational Background: No. 35 - Linda Brock (R. Vol. IV, p. 122); 10) Knew Attorneys - Associated With Defense Attorneys: No. 98 - Voncille Connor (R. Vol. IV, p. 93).

also a professor of sociology at Auburn University at Montgomery. (R. Vol. XIV, p. 1982). Dr. Bogie testified that the relationship between being black and being struck from jury service in this case was overwhelming. (R. Vol. XIV, p. 1984). Dr. Bogie testified that 14 of 16 blacks were rejected for a rejection rate of 87.5%; that 4 of 14 whites were rejected for a rejection rate of 28.6%; and that the one Asian was not rejected for a rejection rate of Ø%. (R. Vol. XIV, p. 1993). Dr. Bogie testified that generally a higher crime rate was found in neighborhoods with a high percentage of blacks and that generally a lower crime rate was found in neighborhoods with a high percentage of whites. (R. Vol. XIV, p. 1995). Dr. Bogie also testified that Juror Elise Mitchell, a

white female, who actually served on the jury, lived in a neighborhood with a crime rate above the mean for the city. (R. Vol. XIV, p. 2005).

Johnnie Mae Miller testified that she had lived in her home on Early Street for thirty-one years and that if the police ever came there, as indicated in the prosecution's proffer, she did not remember it. (R. Vol. XIV, pp. 1960-1961).

Prosecutor Brooks testified and denied any discriminatory animus.

The Circuit Court of Montgomery County, clearly indicating that it was considered all relevant circumstances, overruled Appellant Sims' Batson motion. (R. Vol. XV, pp. 2323-2326).

Respondent Sims filed a motion for reconsideration of the trial court's

order denying a new trial on Batson grounds with an attached affidavit of Mark Gilmore contradicting Prosecutor Brooks' statement in connection with its proffered reason for striking one of the black veniremembers that he had contacted someone in the District Attorney's office on behalf of Sims. (R. Vol. XV, p. 2320).

REASONS FOR DENYING THE WRIT

1. The Franks v. Delaware issue was properly decided below and is not significant enough for review anyway.

The Alabama Court of Criminal Appeals found and concluded that evidence recovered from Sims' homes should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing misstatements made either

intentionally or with reckless disregard for the truth which when deleted left no basis for a finding of probable cause. The State of Alabama essentially quarrels with the Alabama Court of Criminal Appeals' finding of facts in this case.[9] In doing so, the State of

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[9] The State of Alabama likewise complains about the holding of the Alabama Court of Criminal Appeals in Villemez v. State, 555 So.2d 342 (Ala. Cr. App. 1989). In Villamez, 555 So.2d 342, the a narcotics officer's statement in an affidavit that "informant relayed to me that the person she got the marijuana from was a Ronnie Miller and that he was at the Travelers Motor Inn at 421 E. Broad St. in Gadsden, Al., in Rm. # 36" was a misstatement because the evidence at the suppression hearing showed that the informant actually told another narcotics investigator that information and the other narcotics officer relayed the information to the affiant narcotics officer by telephone. Villamez, 555 So.2d at 343. The Alabama Court of Criminal Appeals rejected the State of Alabama's argument that there was not a misstatement contained in the affidavit because police officers may rely upon information supplied by others. In so doing, the Alabama Court

Alabama is tilting at windmills.

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of Criminal Appeals reasoned as follows:

> "'Officers operating in the field are entitled to rely on the information and judgment of fellow officers with whom they are working in close concert. The situation is very different when an application is made for a warrant. Unlike officers in the field, a magistrate is not entitled to rely on the judgment of law enforcement officials. He or she is expected to review the material submitted and make a detached, independent judgment as to the existence of probable cause...'"
>
> "'[A] magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable. [Citations omitted]...."

Villamez, 555 So.2d at 344 (citations omitted). The Alabama Court of Criminal Appeals found that the narcotics officer's "failure to properly identify his source of information was at least reckless, if not intentional." Villamez, 555 So.2d at 344.

In accordance with this Court's holding in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Alabama Court of Criminal Appeals simply and properly focused its evaluation on the representations made in the warrant affidavit and the true facts adduced before the trial court. The Alabama Court of Criminal Appeals quoted from Franks v. Delaware, 438 U.S. 154, at 155-56, 987 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> "'Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or

> reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Applying the proper rule of law to the facts, the Alabama Court of Criminal Appeals found and concluded that "[i]t is clear from a review of the [suppression] hearing that the complained-of statements were made with at least a reckless disregard for the truth. The informant, upon whom [the affiant, Officer] Lay, based his information, did not enter the home of [Sims] and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to

have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson." The Alabama Court of Criminal Appeals found that "[t]he misrepresentations made by Officer Lay resulted in his committing two offenses: '[o]ne against the constitutional guarantee against unreasonable searches, and a second against the judicial system.' United States v.] Cortina, 630 F.2d [1207,] 1213 [(7th Cir. 1980)]." After deleting the misrepresented portions from the affidavit, the Alabama Court of Criminal Appeals found that no probable cause existed and concluded that all the evidence discovered as a

result of the search of Sims' house was due to be suppressed.

The State of Alabama is simply wrong about the evidence.

Robert A. Lay, a detective with the Montgomery Police Department, executed the affidavit upon which the search warrant was based. (S.R., pp. 7-8). The affidavit stated that:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to 'A' to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours.
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.

(S.R., p. 10, State's Exhibit 1).

Lay identified his informant,

referred to as "A" in the affidavit, as Julius Moore. (S.R., p. 12). Lay testified that he based his sworn statement in the affidavit on what Julius Moore had told him. (S.R., p. 12). Lay admitted on cross-examination that Julius Moore had actually stayed in a car and had never gone into Sims' home at the time the transaction alleged to have taken place between Sims and a third person by the name of Eric Johnson and that Julius Moore had not observed any drugs inside of Sims' home. (S.R., pp. 12, 13-14, 28). Lay further admitted that Julius Moore had told him that he had stayed in the car at the time Eric Johnson was supposed to have gone to see Sims about drugs and that Julius Moore had not told him that he had seen any drugs stored in

Sims' home. (S.R., pp. 12, 15, 16, 17, 22, 23). Lay also admitted that Julius Moore had not told him that he had seen Sims hand Eric Johnson any drugs and that he had not seen Eric Johnson hand any money to Sims. (S.R., pp. 17, 22, 23). Lay said that he was not in the area at the time. (S.R., p. 12). Lay said that he did not tell Judge Campbell that Julius Moore stayed in the car during the whole transaction and that he did not discuss the case with Judge Campbell. (S.R., p. 17).

Thus, the following statements in the affidavit were false: (1) "That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the

residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours" and (2) "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September." (R. Vol. XV, pp. 2060, 2106)

Lay attempted to rationalize his misrepresentations to Judge Campbell. However, his attempts were clearly disingenuous and, even if taken at face value, do not detract from the basic problem -- he misrepresented the source of his information. Moreover, a truthful affidavit would not have established probable cause for Lay because the word of the informant, at best, depended upon the word of an unknown drug dealer. Hence, the

statements of the affiant must be deemed to have been at least reckless, if not intentional. After the misstatements are deleted from the affidavit in the instant case, it is clear that the remaining portions of the affidavit do not support a determination of probable cause.

Finally, this case necessarily turned upon its own peculiar facts.[10] Regardless of whether the evidence did or did not warrant a finding that the warrant affidavit contained material misrepresentations, this Court should not grant certiorari merely to review

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[10] In a number of other cases, Alabama courts have rejected claims pursuant to Franks v. Delaware. See e.g., Brown v. State, 568 So.2d 431 (Ala. Cr. App. 1990); Wyley v. State, 565 So.2d 1200 (Ala. Cr. App. 1990); Hamm v. State, 564 So.2d 453 (Ala. Cr. App. 1989); Gray v. State, 507 So.2d 1026 (Ala. Cr. App. 1987).

state appellate courts' interpretation of the facts in a particular case and application of law to facts.

2. The Batson issue was properly decided below and is not significant enough for review anyway.

In Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), this Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. Batson, 476 U.S. at 96-97. Second, if the defendant makes a prima facie showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Batson, 476 U.S. at

97-98. Third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. Batson, 476 U.S. at 98. Accord, Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395, 111 S.Ct. ____ (1991). An invidious discriminatory purpose may be inferred from the totality of the circumstances. Hernandez v. New York, 500 U.S. ____, 114 L.Ed.2d 395, 111 S.Ct. _____ (1991), citing Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976).[11]

The State of Alabama claims that

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[11] The Batson criteria must likewise be met under Article I, Sections 1, 6, and 22 of the Alabama Constitution of 1901. Ex parte, Jackson, 516 So.2d 768 (Ala. 1986)(hereinafter "Jackson"). Further, Section 12-16-56, Code of Alabama provides:. "A citizen shall not be excluded from jury service in this state on account of race, religion, sex, national origin or economic status."

the Alabama Court of Criminal Appeals ignored this process and reversed Sims' conviction without ever ruling on whether Sims made out a prima facie case of racial discrimination or whether he carried his burden of proving purposeful discrimination. The State of Alabama also claims that the Alabama Court of Criminal Appeals treated the issue as one purely of law and accorded no deference to the trial court's findings. These claims are clearly without merit.

The Alabama Court of Criminal Appeals found from the record "that 16 members of the 48 member venire were black and that of the state's 18 strikes, 14 were used to strike black vernirepersons." Noting that after Sims objected to the prosecution's use of peremptory challenges, "the trial court

then required the state to explain its use of peremptory strikes," the Alabama Court of Criminal Appeals proceeded to review the explanations proffered by the prosecution.[12] The Alabama Court of Criminal Appeals found a number of the strikes to be nondiscriminatory. However, the Alabama Court of Criminal Appeals, stated that "[t]he reasons offered by the prosecutor for her remaining strikes present[ed] serious doubts ... as to their validity." "In viewing the prosecutor's actions as a whole [i.e. in viewing the totality of the circumstances], ... [the Alabama Court of Criminal Appeals found] that [those] challenges of black veniremembers were not based on sound race-neutral grounds."

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[12] See note 1.

The Alabama Court of Criminal Appeals did not hold that the reasons proffered by prosecutor Brooks were race-based as a matter of law as posited by the State of Alabama. The Alabama Court of Criminal Appeals simply opined that the reasons proffered by the State of Alabama for those strikes were not in and of themselves race-neutral. The Alabama Court of Criminal Appeals further noted with respect to two of the proffered reasons that the prosecutor did not seek to dispel any doubts about the jurors with a few more questions on voir dire.

In viewing the prosecutor's actions as a whole, the Alabama Court of Criminal Appeals considered the previous record of discrimination by the prosecutor.

The Alabama Court of Criminal Appeals also noted that many of the traits exhibited by black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state.

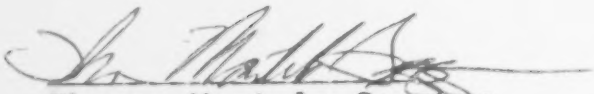
Obviously, the Alabama Court of Criminal Appeals satisfied each step of the process for analysis of jury discrimination issues to reach the ultimate question of whether Respondent Sims carried his burden of proving discrimination. Further, the Alabama Court of Criminal Appeals did not treat this issue purely as a matter of law. Rather, stating twice that it may reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by

intentional discrimination only if that determination is "clearly erroneous," it gave appropriate deference to the trial court. It simply concluded that the trial court had clearly erred to reversal in denying Respondent Sims' Batson challenge.

Finally, this case turned upon its own peculiar facts. Regardless of whether the evidence did or did not warrant a finding that the trial court had clearly erred in denying Respondent Sims' Batson challenge, this Court should not grant certiorari merely to review state appellate courts' interpretation of the facts in a particular case and application of law to facts.

CONCLUSION

The petition for writ of certiorari should be denied.



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CERTIFICATE OF SERVICE

I, Thomas Martele Goggans, a member of the Bar of the Supreme Court of the United States of America and the attorney for Respondent Brad Haywood Sims, hereby certify that on this 25th day of January, 1992, I did serve the requisite number of copies of the foregoing upon the attorneys for the Petitioner by mailing the same to the attorneys first class postage prepaid and addressed as follows:

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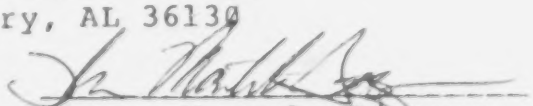

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